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Supreme Court, U.S.
FILED

961982 JUN 9 1997

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No. 97-_____

In The
Supreme Court of the United States
October Term, 1997

ELENO AGUIRRE,

Petitioner/Defendant,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition For Writ Of Certiorari
To The United States Court of Appeals
For The Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

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APP

QUESTIONS PRESENTED

1. Did the District Court violate the Jury Selection and Service Act of 1968, 28 U.S.C. § 1861 *et seq.*, when it excluded over half the jury venire, off the record and outside the presence of the parties?

2. Did the Tenth Circuit err in holding that the defendant waived the Jury Selection Act violation by failing to file a written affidavit with their motion, when they offered the sworn testimony of the jury commissioner in lieu of the affidavit, and when the defendants did not learn details of the judge's exclusion until the hearing on the motion.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioner/defendant, Eleno Aguirre, respectfully prays that a writ of certiorari issue to review the decision of the Tenth Circuit, entered March 11, 1997, affirming the judgment of conviction after a jury trial, presided over by the Honorable Lucius Bunton, senior judge from the Western District of Texas, sitting by designation in the U.S. District Court for the District of New Mexico.

OPINIONS BELOW

The Tenth Circuit affirmed the judgment below, in an opinion issued March 11, 1997, 1997 WL 105032. The opinion below cites to the opinion in the appeal of a codefendant, Doloras Contreras, entered the same day, which contains a more detailed explanation of the Tenth Circuit's reasoning regarding the Jury Selection and Service Act challenge. *See United States v. Contreras*, 1997 WL 105031 (10th Cir. 1997).

JURISDICTION

The judgment of the Tenth Circuit was entered March 11, 1997. This petition for certiorari was timely filed.

This Court has jurisdiction to review the judgment under 28 U.S.C. §1254(1).

STATUTES INVOLVED

28 U.S.C. §1865

(a) The chief judge of the district court, or such other district court judge as the plan may provide, on his initiative or upon recommendation of the clerk or jury commission, shall determine solely on the basis of information provided on the juror qualification form and other competent evidence whether a person is unqualified for, or exempt, or to be excused from jury service. The clerk shall enter such determinationin the space provided on the juror qualification form and in any alphabetical list of names drawn from the master jury wheel. If a person did not appear in response to a summons, such fact shall be noted on said list.

(b) In making such determination the chief judge of the district court, or such other district court judge as the plan may provide, shall deem any person qualified to serve on grand and petit juries in the district court unless he --

(1) is not a citizen of the United States eighteen years old who has resided for a period of one year within the judicial district;

(2) is unable to read, write and understand the English language with a degree of proficiency sufficient to fill out satisfactorily the juror qualification form;

(3) is unable to speak the English language;

(4) is incable, by reason of mental or physical infirmity, to render satisfactory jury service; or

(5) has a charge pending against him for the commission or, or has been convicted in a State or Federal court of record of, a crime punishable by imprisonment for more than one year and his civil rights have not been restored.

28 U.S.C. §1866(c):

Except as provided in section 1865 of this title or in any jury selection plan provision adopted pursuant to paragraph (5) or (6) of section 1863(b) of this title, no person or class of persons shall be disqualified, excluded, excused, or exempt from service as jurors: *Provided*, That any person summoned for jury service may be (1) excused by the court, or by the clerk under supervision of the court if the court's jury selection plan so authorizes, upon a showing of undue hardship or extreme inconvenience, for such period as the court deems necessary, at the conclusion of which such person either shall be summoned again for jury service under subsections (b) and (c) of this section, or (2) excluded by the court on the ground that such person may be unable to render impartial jury service or that his service as a juror would be likely to disrupt the proceedings, or (3) excluded upon peremptory challenge as provided by law, or (4) excluded pursuant to the procedure specified by law upon a challenge by any party for good cause shown, or (5) excluded upon determination by the court that his service as a juror would be likely to threaten the secrecy of the proceedings, or otherwise adversely affect the integrity of jury deliberations. No person shall be excluded under clause (5) of this subsection unless the judge, in open court, determines that such is warranted and that exclusion of the person will not be inconsistent with sections 1861 and 1862 of this title.

28 U.S.C. §1867

(a) In criminal cases, before the voir dire examination begins, or within seven days after the defendant discovered or could have discovered, by the exercise of diligence, the grounds therefor, whichever is earlier, the defendant may move to dismiss the indictment or stay the proceedings against him on the ground of substantial failure to comply with the provisions of this title in selecting the grand or petit jury.

(d) Upon motion filed under subsection (a), (b), or (c) of this section, containing a sworn statement of facts which, if true, would constitute a substantial failure to comply with the provisions of this title, the moving party shall be entitled to present in support of such motion the testimony of the jury commission or clerk, if available, any relevant records and papers not public or otherwise available used by the jury commissioner or clerk, and any other relevant evidence. If the court determines that there has been a substantial failure to comply with the provisions of this title in selecting the petit jury, the court shall stay the proceedings pending the selection of a petit jury in conformity with this title.

(e) The procedures prescribed by this section shall be the exclusive means by which a person accused of a Federal crime, the Attorney General of the United States or a party in a civil case may challenge any jury on the ground that such jury was not selected in conformity with the provisions of this title. Nothing in this section shall preclude any person or the United States from pursuing any other remedy, civil or criminal, which may be available for the vindication or enforcement of any law prohibiting discrimination on account of race, color, religion, sex, national origin or economic status

in the selection of persons for service on grand or petit juries.

28 U.S.C. §1869

For purposes of this chapter --

(a) "clerk" and "clerk of the court" shall mean the clerk of the district court of the United States, any authorized deputy clerk, and any other person authorized by the court to assist the clerk in the performance of functions under this chapter;

(b) "chief judge" shall mean the chief judge of any district court of the United States; . . .

(f) "district court of the United States", "district court" and "court" shall mean any district court established by chapter 5 of this title, and any court which is created by Act of Congress in a territory and is invested with any jurisdiction of a district court established by chapter 5 of this title; . . .

(h) "juror qualification form" shall mean a form prescribed by the Administrative Office of the United States Ccourts and approved by the Judicial Conference of the United States, which shall elicit the name, address, age, race, occupation, education, length of residence within the judicial district, distance from residence to place of holding court, prior jury service, and citizenship of a potential juror, and whether he should be excused or exempted from jury service, has any physical or mental infirmity impairing his capacity to serve as a juror, is able to read, write, speak, and understand the English language, has pending against him any charge for the commission of a State or Federal criminal offense punishable by imprisonment for more than one year, or has

been convicted in any State or Federal court of record of a crime punishable by imprisonment for more than one year and has not had his civil rights restored. The form shall request, but not require, any other information not inconsistent with the provisions of this title and required by the district court plan in the interests of the sound administration of justice. The form shall also elicit the sworn statement that his responses are true to the best of his knowledge. Notarization shall not be required. The form shall contain words clearly informing the person that the furnishing of any information with respect to his religion, national origin, or economic status is not a prerequisite to his qualification for jury service, that such information need not be furnished if the person finds it objectionable to do so, and that information concerning race is required solely to enforce nondiscrimination in jury selection and has no bearing on an individual's qualification for jury service. . . .

(j) "undue hardship or extreme inconvenience", as a basis for excuse from immediate jury service under section 1866(c)(1) of this chapter, shall mean great distance, either in miles or travel time, from the place of holding court, grave illness in the family or any other emergency which outweighs in immediacy and urgency the obligation to serve as a juror when summoned, or any other factor which the court determines to constitute an undue hardship or to create an extreme inconvenience to the juror; and in addition, in situations where it is anticipated that a trial or grand jury proceeding may require more than thirty days of service, the court may consider, as a further basis for temporary excuse, severe economic hardship to an employer which would result from the absence of a key employee during the period of such service; . . .

Local Jury Plan for the District of New Mexico

Pursuant to the Jury Selection and Service Act of 1968, as amended (28 U.S.C, § 1861, et seq.), the following plan is hereby adopted by this Court, subject to approval by the Tenth Circuit Judicial Council and to pertinent rules and regulations of the Judicial Conference of the United States.

. . .

b. Management and Supervision of the Jury Selection Process. The Clerk of the Court shall manage the jury selection process under the supervision and control of the Chief Judge. The Chief Judge may by written order designate another active judge of this district to perform any or all of the duties required by this plan. The Clerk of the Court is authorized to grant temporary excuses to prospective jurors on the grounds of undue hardship or extreme inconvenience.

c. Policy. It is the policy of the Court that all litigants in this Court, entitled to trial by jury, shall have the right to grand and petit juries selected at random from a fair cross-section of the community in each division wherein the Court convenes. All citizens residing within the district shall have the opportunity to be considered for service on grand and petit juries and shall have an obligation to serve as jurors when summoned for that purpose.

d. Discrimination Prohibited. No citizen shall be excluded from service as a grand or petit juror in this Court because of race, color, religion, sex, national origin or economic status.

e. Jury Selection Sources. The judges of this Court find that voter registration lists maintained by each county

represent a fair cross-section of the community in the District of New Mexico. Accordingly, prospective grand and petit jurors shall be selected at random from the voter registration lists of the counties in each jury division.

f. Method and Manner of Random Selection of Names for Master Jury Wheels. In order to establish a master jury wheel of randomly selected names of prospective jurors in each division, the Clerk shall determine the aggregate number of registered voters in the counties of each division. After determining the total number of names desired for each drawing for each master jury wheel, the Clerk shall divide the number of names needed into the number available as reflected by the aggregate of registered voters, to obtain an increment number. The increment number is used to ascertain the starting number, drawn by lot in a public proceeding, for purposes of randomly selecting names in the given sample. For example, if 25,000 names are available as the aggregate in the counties within a given division, and it is desired to place 1,000 names into a master jury wheel drawing, the increment number is determined by dividing 25,000 by 11000. The increment of 25 then constitutes the range of numbers from which a starting number is drawn by lot and which is used to select every 25th name thereafter from the source list. The names selected are then placed in the master jury wheel for the pertinent division.

g. Method and Manner of Random Selection of Names for Qualified Juror Wheels. In order to establish a qualified juror wheel for each division, the Clerk shall determine the total number of names desired to be placed in such records. A system for random selection as described above is used, however, the increment number is derived by dividing the total number of names remaining in the master

jury wheel of a specific division by the number of names desired to be placed in the qualified jury wheel for each division, The increment number so obtained is then used to obtain a starting number which is also drawn by lot as described above. After the names are randomly selected, prescribed Juror qualification questionnaires are sent to the selectees. After completion, the questionnaires are returned to the Clerk who screens them to assure that those selected are qualified and not exempted by law or excused as permitted by this plan. The names of those prospective jurors found qualified and not exempt or excused are then placed in the qualified juror wheel of the pertinent jury division.

h. Method and Manner of Random Selection of Names for Juror Panels. Whenever a jury panel is desired for a specific date and place of holding court, the number of jurors desired is divided into the number of names available in the pertinent qualified juror wheel in order to obtain an increment number. The increment number is used to obtain a starting number, drawn publicly by lot, which is further used in the random selection of names to submit the appropriate juror summons form.

. . .

j. Maintaining Master Jury Wheels. The master jury wheel for each division shall be emptied and refilled every two years with names and addresses of persons randomly selected from the lists of registered voters not later than September 1 of each two year cycle commencing with 1985. The Chief Judge may, however, order that additional names be added to the master wheels, when and if needed.

Pursuant to 28 U.S.C. § 1863(b)(4). the minimum number of names to be placed in the Las Cruces and Roswell jury divisions shall be 1,000 names each and 3,000 names for the

Albuquerque/Santa Fe jury division.

k. Maintaining Qualified Juror Wheels. The Clerk shall maintain separate qualified juror wheels for each division and shall place, or have placed, the names of all persons drawn from the master jury wheel and not disqualified, exempt or excused pursuant to this plan. When ordered by the Chief Judge, the Clerk shall arrange to have the names produced from the master jury wheels of as many persons as may be required to maintain at least 200 names in each qualified juror wheel of each division. The Clerk will forward the increment and starting number to the computer center for its use in machine selection of persons to whom qualification questionnaires are to be sent.

l. Drawing from Qualified Juror Wheel. Upon order of the Court for the drawing of a grand and petit jury panel, the Clerk shall advise the computer center of a starting number drawn by lot and of the multiple (increment) required to produce from the qualified juror wheel the number of names needed, The Clerk shall promptly make available to the parties and the public lists of the names, ages, addresses and occupations of the panel. However, the names drawn may be kept confidential for any time to date of appearance in any case where the Court finds that the interests of justice so require. For statewide panels, or panels from the Albuquerque/Santa Fe division, the Court shall direct where the panel shall serve.

m. Public Announcement of the Place and Time of Selection of Starting Numbers. Random drawings of starting numbers shall be publicly made by the Court at a place, date and time to be posted on the Clerk's bulletin board. The location and the approximate time and date of the

drawing of names by automated selection methods at the designated computer center can be obtained by inquiry at the Clerk's Office.

n. Petit Jury Pool. Any petit jury panel drawn shall be utilized as a jury pool. The petit jury in any case shall be selected at random from the entire panel, excepting those who have been excused or excluded as provided by the Act or this plan. If the panel is larger than is needed for service on a particular day, the Clerk shall draw at random the names of those to be temporarily excused.

o. Panels for Entire District. The Chief Judge may at any time order a grand or petit jury panel to be drawn from the entire panel toserve at the designated place of holding court. The panel shall be comprised of names produced by computer from the qualified juror wheels of each division in the proportion that the number of registered voters in each division bears to the total number of registered voters in the district.

p. Automatic Exemptions from Jury Service. Only those persons specified in the Act shall be exempt from jury service.

q. Excuses from Jury Service. Excuses from jury service will not be automatically granted on the basis of specific occupations or professions. Excuse from jury service may be granted by the Chief Judge upon individual request whenever such jury service would entail undue hardship or extreme personal inconvenience and the excuse is not inconsistent with the Act. Excuse from jury service may be granted to all persons over 70 years of age who request to be excused. Volunteer safety personnel shall be provided an

automatic excuse from jury service upon individual request. These are personnel who serve without compensation as firefighters or members of a rescue squad or ambulance crew for a public agency.

r. Definitions. The "Court" means any judge of this district. The "Act" means the Jury Selection and Service Act of 1968, as amended.

STATEMENT OF THE CASE

Eleno Aguirre and 21 codefendants (many of them related by blood or marriage) were indicted in the District of New Mexico, on October 20, 1992, in a 23-count indictment charging, among other things, continuing criminal enterprise, conspiracy, possession with intent to distribute marijuana, aiding and abetting, and money laundering. Only two counts pertained to Eleno Aguirre -- count II (conspiracy), and count XV (structuring a financial transaction to avoid reporting requirements).

The first trial, involving nine of the codefendants, was held before the Honorable John E. Conway in Albuquerque, New Mexico, beginning January 10, 1994. The trial ended with the acquittals of three codefendants, an acquittal on one count against a codefendant, and a hung jury as to the rest of the counts and codefendants.

The second trial was commenced on November 14, 1994, before the Honorable Lucius Bunton, a senior judge from the Western District of Texas, sitting by designation.

Less than a week prior to the start of the second trial,

the defense were provided copies of the jury questionaires (which had been drafted by defense counsel) and juror qualification forms of the panel which had been summoned. At that point they first learned that only 115 of the 250 jurors randomly drawn from the jury wheel had been summoned to court. They were not told what happened to the remainder of the jurors.

On the first day of trial, before jury selection began, defendants Gabriel Rodriguez-Aguirre and David Morales filed motions to quash the jury venire. All the defendants joined in the motions. The court held a hearing on the motions, prior to voir dire. The defense called Nancy Metzgar, the jury administrator for the District Court, to explain under oath what had happened to the rest of the jury venire.

The hearing on the motion to strike the jury venire

Ms. Metzgar testified as to the manner in which the jury panel was selected, and explained how the jury venire was chosen from a jury wheel, drawn from voter registration lists, using an "increment number" and "starting number" method to ensure randomness. That same method was used to select a qualified juror wheel, and then a 250 person jury venire. Up to this point, the process complied with the procedures in the local jury plan.

Ms. Metzgar testified that, after a panel of 250 was selected using the above process, but several weeks before the trial, Judge Bunton, a senior judge from another circuit who would be trying the case by special designation, asked her to send him the juror qualification forms and "confidential juror questionnaires" of the 250 member venire. She complied.

The juror qualification forms she sent were those mandated by 28 U.S.C. §1869(h), which were routinely used by the clerk to grant temporary excuses under Section b of the local jury plan.

The "confidential juror questionnaires" which Ms. Metzgar sent the trial judge were not standard forms used in jury prequalification. They were drafted by the defense attorneys and submitted to the jurors in advance, on motion by the defense, in order to obtain information for use during voir dire. The four-page questionnaire contained 14 questions, many with multiple parts. It asks the jurors whether they or close family members had ever worked in certain industries, the names of the organizations to which they belong, what news sources and television stations they read or watch, whether they had heard about the case, their views about drugs and the court system, previous jury service, and whether it would be a hardship if the trial lasted three to four months. Many of the questions asked the jurors to explain their views in essay-type answers.

Ms. Metzgar testified that the trial judge reviewed the confidential juror questionaires and juror qualification forms of the 250 jurors on the panel individually and culled out 135 of the 250 jurors, directing Ms. Metzgar, to summon only the remaining 115 jurors from the venire. She did as she was instructed.

When the defense asked Ms. Metzgar to articulate the basis for the exclusions of the 135 jurors, she could not do so. She merely stated that "the judge reviewed those individually and then told me which jurors to excuse." At that point, the judge volunteered that "I retained the stack of [questionaires

of] those who, for some reason or other, claimed that they couldn't serve."

The juror questionnaires

The judge made no record of his reasoning in excusing the 132 jurors pre-voir-dire.

The juror questionnaires of the excluded jurors can be roughly broken down as follows. Three resided outside the jurisdiction. One was deceased and another was on jury duty elsewhere. Fifty-six claimed some form of hardship but nothing that could indicate bias. Twenty-seven made statements that could be interpreted as showing bias, but did not claim hardship. The questionnaires of thirty-eight jurors contained both claims of hardship and opinions on the issues -- so that it is not clear which ground the judge relied on in excluding them. Many of the jurors who stated their opinions on the issues (as they were asked to do in the special "confidential questionnaire) also indicated that, despite their opinions they could be fair and impartial. Three were excused for no permissible reason -- one juror whose husband had a pending marijuana charge, one who stated "I know a David Morales -- I'm not sure if it's the same one;" and another who refused to give reasons, stating: "the reason for me not being able to serve is very confidential and I cannot disclose the criteria of this."

Weighing the claims on the questionnaires of the excluded jurors, the defense identified 76 to 80 jurors who were excluded by the judge pre-voir-dire for impermissible reasons. Three had no legitimate excuse at all. Of the hardship-only class, many of their excuses seemed too weak: two had weak excuses involving their own health, three

involving the health of family members; five merely claimed they had children at home; four were excused because they were students; five were self-employed; six had weak claims of hardship to their employer (one said he could lose his job if he were to serve on the jury); three claimed travel difficulties; nine claimed it would be difficult financially or complained about the inadequacy of jury fees; one did not want to be away from home that long, and another was planning a cruise.

It is clear from the record that the judge did not dismiss all the jurors who claimed hardship on their questionnaires.

Voir dire

Of the 115 jurors summoned, 108 appeared. During voir dire, the court excused eight on grounds of hardship. The vast majority of the people who claimed hardship during voir dire were not excused by the judge. This is in marked contrast to the court's liberal culling of jurors on the basis of their questionnaires alone.

The court at first refused to excuse a 70 year old juror who asked to be excused, then returned after a recess to announce that he had just learned that the local jury plan required him to excuse those over 70 who requested to be excused.

Two jurors during voir dire acknowledged acquaintance with witnesses. Neither were excused. Another juror had been a police officer in Odessa, Texas (where the judge lived) and claimed, possibly in jest, that he had followed the judge around a couple of times. The juror stated that he "didn't believe" his involvement in law enforcement would

affect his ability to be fair. After warning the juror that "I don't believe" leaves a doubt, the juror stated that he "believed" he could be fair. The Court told him "that's what you must do" and refused to strike him for cause.

REASONS FOR GRANTING THE PETITION

I. The trial judge, in culling out over half of the jury venire off the record, violated the procedures mandated by the Jury Selection Act and the local jury plan, and destroyed the randomness which had previously been achieved by the jury commissioner, in compliance with the local plan.

The Jury Selection and Service Act of 1968, 28 U.S.C. §1861 *et seq.*, (hereafter cited as "The Jury Selection Act") was enacted "to ensure that potential grand and petit jurors are selected at random from a representative cross section of the community and that all qualified citizens have the opportunity to be considered for service." *United States v. Bearden*, 659 F.2d 590, 593 (5th Cir. 1981), cert. denied, 456 U.S. 936 (1982). To achieve these goals, the Act requires each District Court to adopt a plan for jury selection. The plan for the District of New Mexico is set out on pages _ through ~~of~~ this petition.

Under the local jury plan, a "master jury wheel" is selected at random from a list of all the registered voters in each division of the district. Jury Plan, §f.

Next, the clerk of the court selects a smaller list -- the "qualified jury wheel" -- as follows. First, the clerk determines the number of jurors desired for the list, and selects them at random, using the same "increment number" and starting number technique used to select the "master jury wheel." Next, juror qualification forms are sent to all the selectees. Then

> the Clerk . . . screens them to assure that those selected are qualified and not exempted by law or excused as permitted by [the] plan. The names of those prospective jurors found qualified and not exempt or excused are then placed in the qualified juror wheel...

Jury Plan, §g.

A "jury panel" is then selected at random from the qualified jury wheel, using the same increment number and starting number techniques, and those persons are summoned to court. Jury Plan, §h. The names, ages, addresses and occupations of the panel are promptly made available to the parties. Jury Plan, §l. "If the panel is larger than is needed for service on a particular day, the Clerk shall draw at random the names of those to be temporarily excused." Jury Plan, §n.

The record shows that the jury venire was properly selected up to this point. However, after the screening by the clerk, the judge made his own off-the-record screening, relying on information obtained through the confidential questionnaires designed by the defense -- forms not available to the clerk in excluding jurors under the local plan.

The trial court's pre-voir-dire exclusion of over half the jury venire was a substantial failure to comply with the Jury Selection Act and the local jury plan for the following reasons:

1. The trial judge had no discretion under the local plan to dismiss jurors prior to voir dire.

2. The judge's culling from the panel created an extra round of exclusions beyond those permitted under the plan -- in addition to exclusions by the clerk.

3. The trial judge relied on information from the special confidential questionnaires which were designed by the defense to elicit the opinions of the jurors. This information was not only unavailable on the official juror qualification form, but impermissibly allowed the judge to discriminate on the basis of juror attitudes and opinions that fell short of the bias necessary to dismiss for cause.

4. Several of the exclusions were for totally impermissible reasons.

5. The court did not indicate his reasons for excluding each of the jurors on their forms, as §1865(a) requires the clerk to do. Many of the jurors were excused for reasons which could not be determined from the record because their questionnaires showed a mixture of reasons.

6. Many of the hardship exclusions were made without sufficient information to show "undue hardship or extreme inconvenience" as defined in the statute and jury plan.

7. All of the excusals that appear to be based on bias were exclusions the trial judge had no discretion to make off the record and outside the presence of the parties.

8. The standards the court used in his off the record dismissals and those at voir dire different drastically. Jurors were liberally dismissed on the basis of their questionnaires alone, in the judge's prescreening, and then those who came to court were denied excusals -- often based on the same reasons given by jurors who were culled out off the record.

In determining whether a violation of the Jury Selection Act is substantial, the violations should be measured against the purposes of the Act. *United States v. Gregory*, 730 F.2d 692, 699 (11th Cir. 1984.) These principles are: (1) random selection of jurors, and (2) "determination of disqualifications, excuses, exemptions, and exclusions on the bases of objective criteria only." *United States v. Calabrese*, 942 F.2d 218, 227 (3rd Cir. 1991.)

The trial court's deviation from the Act and the local plan constituted substantial violations with regard to both factors. As the Fifth Circuit stated in *United States v. Kennedy*, 548 F.2d 608, 612 (5th Cir. 1977), "[n]onrandom selection of a subgroup from a randomly selected group does not make for a randomly selected subgroup."

Secondly, the fact that the court had extensive information about the jurors' individual opinions, beliefs and lifestyles from their confidential questionnaires -- information not available to the clerk in prescreening for hardship or disqualifying factors under the Act and local plan -- allowed the judge to make excusals based on subjective and

impermissible criteria. Because the judge did not record his reasons for culling out over half the panel, there is no way to review his exercise of discretion -- discretion he did not have.

Under the circumstances it is all too likely "that the excusals could frustrate the Act's goal of eliminating subjective practices that could facilitate racial, religious, economic and ethnic discrimination." *Calabrese*, 942 F.2d at 229.

II. The Tenth Circuit erred in holding that the defendant waived the Jury Selection Act violation by failing to file a written affidavit with their motion.

The Tenth Circuit did not reach the merits of the Jury Selection Arguments discussed in Part I above because it held that the defendants had waived the Jury Selection Act violations by not filing an affidavit setting out the specific facts showing the violation along with their motion to strike the jury venire.

The problem was, on the eve of trial when the defense was preparing the motion to strike, they were still clueless as to what happened to the rest of the jury. They did not learn the details of the judge's culling of the panel until the hearing on their motion. Once the hearing concluded, the court went immediately into voir dire and then started the trial. There was no time, after learning the facts, to file a affidavit setting out the facts.

The Jury Selection Act states that violations of the Act must be raised "before the voir dire examination begins, or within seven days after the defendant discovered or could

have discovered, by the exercise of diligence, the grounds therefor, whichever is earlier." 28 U.S.C. §1867(a).

A. The testimony of the jury commissioner, under oath, and the judge's statements, at the hearing on the motion, fulfilled the requirement of a sworn statement.

The sworn testimony of the jury commissioner at the hearing, in combination with the unsworn statements of the judge at the hearing, should satisfy the Act's requirement of a "sworn statement of facts which, if true, would constitute a substantial failure to comply with" the Act. 28 U.S.C. § 1867(d). Although §1867(d) states that this affidavit is to be filed with the motion, no prejudice to the court or any party flows from the slight delay in submitting the "sworn statement" in this case. The obvious reason for requiring the affidavit be filed with the motion is to give the trial judge sufficient grounds to determine whether to hold an evidentiary hearing on the motion. The key deadline here is the start of voir dire -- for a motion striking the panel would only require a brief delay to secure another venire, and would not waste judicial resources on a trial which would be jeopardized by problems in the jury selection process.

Here, the judge knew firsthand what happened to the 132 jurors, and did not need a sworn affidavit to make his decision whether to require an evidentiary hearing.

At the evidentiary hearing, the court heard the sworn testimony of the juror commissioner. It is axiomatic that sworn testimony is more probative than an affidavit because the parties have an opportunity to cross examine, and the

factfinder had the opportunity to assess the demeanor of the witness.

Furthermore, the judge's own unsworn admissions about his culling of the jury supplied ample grounds for striking the jury panel. The parties could not be expected to place the judge under oath and question him about his conduct. Furthermore, it would not be necessary for the judge to take an oath about these facts, for they were within his own knowledge and he was the factfinder.

B. It was impossible for the defendant to file an affidavit setting forth the facts along with the motion, because he did not learn the facts until the hearing on the motion.

Because the defendants did not learn the details of the judge's actions until the evidentiary hearing, it was impossible for them to accompany their motion with an affidavit detailing the violations of the Act.

The legislative history of the Jury Selection Act indicates that reasonable leeway should be given in situations such as this one, where strict compliance with the procedures is impossible.

> *Absent some indication from particular circumstances that counsel could not reasonably have been expected to comply with the procedural prerequisites* to a statutory challenge to the jury, the claim under the Act will be forfeited by noncompliance.

H.R.Rep. No. 1076, 90th Cong., 2d Sess. (1968), *reprinted in* 1968 U.S.Code Cong. & Admin.News, pp. 1792, 1806; S.Rep. 891, 90th Cong., 1st Sess. 33 (1967) (emphasis added.)

III. The opinion below creates a split among the circuits as to whether sworn testimony will substitute for an affidavit accompanying the motion.

The Third Circuit held in *Calabrese*, 942 F.2d at 222, that sworn testimony at a hearing on a motion to quash the jury venire will substitute for the affidavit requirement:

> In this case, appellants timely objected, but did not file the sworn statement of facts required by the Act. Rather, they relied primarily on the sworn testimony of the clerk who had granted the allegedly unwarranted exclusions. This testimony was elicited immediately after the defendants objected to the exclusions. Furthermore, it contained undisputed facts, sufficient to provide the district court with a basis for making a decision. We believe that this is sufficient compliance with the statute's procedural requirements. See *United States v. Maldonado*, 849 F.2d 522, 523 (11th Cir.1988) (suggesting an exception for undisputed facts, sufficient to provide a basis for the district court's decision, but finding it inapplicable to the case then before the court). Therefore, defendants have properly raised the issue.

The opinion below directly conflicts with *Calabrese*, under circumstances far more compelling than those confronted by the Third Circuit.

It is simply not true, as the Tenth Circuit stated in the companion case of the codefendant, *United States v. Contreras*, 1997 SL 105031 at *11, that the Third Circuit's decision in *Calabrese* is "contrary to the overwhelming weight of authority." None of the other cases cited in the Tenth Circuit's opinion involved a situation where sworn testimony was offered in lieu of the sworn affidavit. The other cases had neither a sworn affidavit nor sworn testimony demonstrating a substantial violation of the Jury Selection Act.

Conclusion

The district court violated the Jury Selection and Service Act of 1968, 28 U.S.C. § 1861 *et seq.*, when it culled out over half the jury venire, off the record and outside the presence of the parties, prior to voir dire.

The district judge made these pre-voir dire exclusions based on information elicited in special questionnaires drafted by defense counsel for use in voir dire. Some of the jurors the court excluded prior to voir dire claimed hardship on their questionnaires; however, some of the jurors who claimed hardship were not excused, even after voir dire. Some jurors who were not excused after voir dire gave the same reasons as jurors who were excused pre-voir dire.

Other jurors were apparently excluded by the court prior to voir dire for bias. Several were excused for clearly impermissible reasons. One knew a "David Morales" but was not sure it was the same one. One refused to give reasons why she could not serve. One thought she might lose her job if she served. Several complained that the jury fees were too low.

The Tenth Circuit erred in holding that the Jury Selection Act violation was waived because the defense failed to file an affidavit, detailing the facts of the judge's pre-voir-dire culling of the jury, along with their motion to quash. Under the circumstances, the testimony of the Jury Commissioner at the hearing on the motion supplied the "sworn statement" requirement.

The Tenth's Circuit's opinion created a division of the circuits, with the Third Circuit, which held in *Calabrese* that testimony under oath fulfills the statutory requirement of a sworn statement.

It was impossible for the defendants to articulate the Jury Selection Act violations, in an affidavit filed with the motion to strike the jury venire, because they did not learn the particulars about how the district judge culled out half the jury venire, until the hearing on the motion. The legislative history of the Jury Selection Act indicates that strict compliance with the affidavit requirement is excused when counsel could not reasonably have been expected to comply.

Accordingly, this Court should grant certiorari.

Respectfully submitted,

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Dated: June 9, 1997

UNITED STATES of America, Plaintiff-Appellee,

v.

Eleno AGUIRRE, Defendant-Appellant.

No. 95-2068.
United States Court of Appeals,
Tenth Circuit.
March 11, 1997.

Charles L. Barth, Assistant United States Attorney (John J. Kelley, United States Attorney, Laura Fashing, Special Assistant United States Attorney, with him on the brief), Albuquerque, New Mexico, for Plaintiff-Appellee.

Brenda G. Grantland, Mill Valley, California, for Defendant-Appellant.

Before BALDOCK and BRORBY, Circuit Judges, and DANIEL, (FN*) District Judge.

BRORBY, Circuit Judge.

****1** A New Mexico federal jury convicted Eleno Aguirre on four counts in a multi-defendant, multi-count indictment, and the United States District Court for the District of New Mexico sentenced Mr. Aguirre to a term of 235 months imprisonment. Mr. Aguirre now appeals his convictions. We exercise jurisdiction over Mr. Aguirre's appeal pursuant to 28 U.S.C. s 1291 (1994).

I. FACTUAL AND PROCEDURAL BACKGROUND

Gabriel Rodriguez-Aguirre managed a family-run organization ("the Aguirre organization") specializing in the sale and distribution of large amounts of marijuana and cocaine. *United States v. Denogean*, 79 F.3d 1010, 1011 (10th Cir.), *cert. denied*, --- U.S. ----, 117 S.Ct. 154, 136 L.Ed.2d 99 (1996). Between 1984 and 1992, the organization sold more than 20,000 pounds of marijuana and over 20,000 pounds of cocaine to narcotics traffickers in New Mexico, Arizona, Utah, Kansas, Massachusetts, and elsewhere throughout the United States. *Id.* The organization used narcotics proceeds to purchase real property and other assets. *Id.* Defendant Eleno Aguirre, the brother of Gabriel Rodriguez-Aguirre, was involved in the Aguirre organization.

On October 20, 1992, a federal grand jury in the District of New Mexico returned a twenty-three count indictment against Mr. Aguirre and twenty-one other defendants, including Mr. Rodriguez-Aguirre. The bill of indictment charged Mr. Aguirre with conspiracy to distribute more than 1,000 kilograms of marijuana, in violation of 21 U.S.C. s 841 (1994), and conducting a financial transaction with illicit proceeds with knowledge the transaction was designed to avoid federal reporting requirements, in violation of 18 U.S.C. ss 1956(a)(1)(B)(ii) and 2 (Supp.1996). Mr. Aguirre pled not guilty to the charges against him, and proceeded to trial with his co-defendants in January 1994.

The original trial of Mr. Aguirre and his co-defendants lasted six months, becoming "the longest federal criminal trial

ever held in the District of New Mexico." *United States v. Rodriguez-Aguirre*, 73 F.3d 1023, 1024 (10th Cir.1996). After deliberating for more than six weeks, the jury was unable to reach a verdict on the majority of counts, and the trial judge declared a mistrial. *Id.* Neither the United States nor counsel for Mr. Aguirre objected to the mistrial.

In August 1994, the United States obtained a superseding indictment against Mr. Aguirre and nine of his co-defendants. In addition to the charges included in the original indictment, the superseding indictment contained additional charges against Mr. Aguirre. Count II charged Mr. Aguirre with conspiracy to possess with the intent to distribute cocaine, and conspiracy to distribute cocaine. Count XIII charged Mr. Aguirre with receiving income from the distribution of controlled substances and investing this income in the E & J Lounge, in violation of 21 U.S.C. s 854 (1994). Count XVII charged Mr. Aguirre with possession with the intent to distribute more than five kilograms of cocaine.

**2 The United States retried Mr. Aguirre and his co-defendants in November and December 1994. Prior to trial, the court randomly selected a jury panel of approximately 250 jurors at random from voter registration lists for the Roswell Division of the District of New Mexico. The district judge excused the remaining jurors *sua sponte* after reviewing the juror questionnaires; the court directed only 115 jurors to report for jury service. Six days prior to the start of trial, defense counsel were provided copies of the jury questionnaires for the panel that had been selected for service and learned that the court had excused the remaining jurors.

On the first day of trial, prior to jury selection, defendant

Gabriel Rodriguez-Aguirre filed a motion to stay the proceedings, and defendant David Morales filed a motion to quash the jury venire (FN1). The motions alleged the jury venire panel seriously misrepresented the ethnic makeup of the District of New Mexico. Specifically, the defendants claimed persons of Hispanic origin and American-Indian background were underrepresented. The defendants sought a stay of the trial to allow time for an investigation of the ethnic background of all the jurors. In addition, Mr. Morales' counsel, Paul Kennedy, advised the court orally of *United States v. Calabrese*, 942 F.2d 218 (3d Cir.1991). Mr. Kennedy argued *Calabrese* stood for the proposition that reversible error exists once a court excludes a juror prior to voir dire "simply because a juror knows a defendant." Mr. Kennedy claimed it appeared the court had excused at least one juror because the juror stated he or she knew one of the defendants.

Following Mr. Kennedy's comments, the court held an evidentiary hearing at which Nancy Metzger, jury administrator for the Federal Court Clerk's office, testified. Ms. Metzger stated the jury panel of approximately 250 jurors had been selected at random from voter registration lists. Ms. Metzger testified that the district judge reviewed the juror questionnaires and directed her to excuse more than 100 specific jurors. Ms. Metzger stated she did not know the ethnicity of either the excused jurors or the jurors who had reported for service.

The court then stated it had reviewed the individual juror questionnaires and "retained the stack of those who, for some reason or other, claimed that they couldn't serve." The court explained:

I think it goes without saying that the ones that were not summoned, I never looked at the last name, whether it was [a] Hispanic surname or whether it was not a Hispanic surname, or whether they were American Indians or not. As a matter of fact, I'm not real sure that that's part of the questionnaire--

Ms. Metzger confirmed the jurors were not directed to list their ethnicity on the questionnaire forms.

The district court denied the defendants' motion to stay the proceedings and the defendants' motion to quash the jury venire. However, the court allowed the defendants to supplement the record within ten days of the completion of the trial with information concerning the racial composition of the District of New Mexico and the Roswell Division. None of the defendants chose to supplement the record with such information.

**3 Following a one month trial, the jury returned a verdict against Mr. Aguirre on all four counts the United States charged him with in the superseding indictment. Thereafter, Ms. Sonia Gallegos, Mr. Aguirre's co-defendant who was also convicted, filed a motion for a new trial. Mr. Aguirre adopted Ms. Gallegos' motion for a new trial pursuant to the district court's standing order that "anything that anybody files the others adopt." Mr. Aguirre argued, *inter alia*, he was entitled to a new trial because of jury misconduct. Mr. Aguirre attached an affidavit from defense investigator Kelly Owens to his motion. Mr. Owens testified that following the trial, he questioned nine of the twelve jurors who convicted the defendants. Mr. Owens stated that one of the jurors, Linda Howard, admitted looking up the

dictionary definition of the word "distribution" on the evening after the first day of deliberations and orally sharing its definition with the other jurors on the following day. According to Mr. Owens, Ms. Howard stated the juror's discussed the meaning of "distribution" as it related to the guilt or innocence of Ms. Gallegos. Mr. Owens also testified juror Ronnie Warmuth claimed he had knowledge of another juror researching the dictionary definition of the word "hypothecate." (FN2) In his post-trial motion, Mr. Aguirre contended this improper juror conduct prejudiced him and entitled him to a new trial.

The district court denied Mr. Aguirre's motion for a new trial, rejecting the defendants' claim of jury misconduct. The court concluded the word distribution was one of common usage, and there was no indication any of the jurors relied upon its dictionary definition or that it "made any difference at all in the jury deliberations."

At sentencing, the district court determined Mr. Aguirre had an offense level of 38, a criminal history category of I, and a sentencing range of 235 to 293 months. The court sentenced Mr. Aguirre to a term of 235 months imprisonment on Counts II, XII and XVII. As to Count XIII, the district court sentenced Mr. Aguirre to a term of 120 months, to run concurrently with the 235 month sentence.

II. ISSUES RAISED ON APPEAL

Mr. Aguirre raises three issues on appeal: (1) whether the district court's dismissal of over 100 jurors, off the record, and outside the presence of the defendants and counsel, violated Mr. Aguirre's constitutional rights and his rights

under the Jury Selection and Service Act of 1968, 28 U.S.C. ss 1861-1878 (1994); (2) whether the district court abused its discretion in failing to grant Mr. Aguirre a new trial based upon the jury's misconduct in looking up the dictionary definitions of certain words; and (3) whether the superseding indictment filed after the mistrial should have been dismissed on grounds of prosecutorial vindictiveness. (FN3)

III. ANALYSIS

A. Jury Selection and Service Act

[1] Mr. Aguirre first contends the district court's excusal of over half of the original jury panel, off the record and outside the presence of the defendants and counsel, violated the Jury Selection and Service Act and his constitutional rights under the Fifth and Sixth Amendments. 28 U.S.C. s 1867(d) requires all motions challenging compliance with the Jury Selection and Service Act to be accompanied by a "sworn statement of facts which, if true, would constitute a substantial failure to comply with the [Jury Selection and Service Act]." In the recent appeal of Mr. Aguirre's co-defendant, Doloras Contreras, we determined Ms. Contreras' claim under the Jury Selection and Service Act was barred by the defendants' failure to accompany their motions challenging the district court's jury selection process with an adequate sworn statement as required by 28 U.S.C. s 1867(d). *United States v. Contreras*, --- F.3d ---- (10th Cir., Mar. 11, 1997). Here, as in *Contreras*, Mr. Aguirre failed to file a sworn affidavit in support of his motions challenging the district court's jury selection procedures. Consequently, Mr. Aguirre's Jury Selection and Service Act claim is barred.

**4 Also in *Contreras*, we denied Ms. Contreras' Fifth and Sixth Amendment challenges to the jury selection procedures. *See id.* at ----. Specifically, we determined Ms. Contreras could not establish a *prima facie* case of a fair cross section violation or an equal protection violation, and we concluded Ms. Contreras' Sixth Amendment impartial jury claim was without merit. *Id.* For the reasons stated in *Contreras*, we likewise find no merit in Mr. Aguirre's constitutional challenges to the jury selection procedures. (FN4)

B. Jury Misconduct

[2] [3] [4] Mr. Aguirre next contends the district court erred in failing to grant him a new trial based upon the jury's misconduct in using a dictionary to look up the definition of the words "distribution" and "pontificate." It is well settled that a jury's exposure to extrinsic information gives rise to a rebuttable presumption of prejudice. *See Mayhue v. St. Francis Hosp. of Wichita, Inc.*, 969 F.2d 919, 923 (10th Cir.1992); *United States v. Hornung*, 848 F.2d 1040, 1044-45 (10th Cir.1988), *cert. denied*, 489 U.S. 1069, 109 S.Ct. 1349, 103 L.Ed.2d 817 (1989); *United States v. Perkins*, 748 F.2d 1519, 1533 (11th Cir.1984). To overcome this presumption, the United States must prove the jury misconduct was harmless to the defendant. *Hornung*, 848 F.2d at 1044-45; *Marino v. Vasquez*, 812 F.2d 499, 505 (9th Cir.1987); *Perkins*, 748 F.2d at 1534; *United States v. Kupau*, 781 F.2d 740, 744 (9th Cir.), *cert. denied*, 479 U.S. 823, 107 S.Ct. 93, 93 L.Ed.2d 45 (1986).

[5] To determine whether the United States has overcome the presumption of prejudice, the court must

objectively weigh all of the facts and circumstances of the case. *Mayhue*, 969 F.2d at 923-24.

> When a trial court is apprised of the fact that an extrinsic influence may have tainted the trial, the proper remedy is a hearing to determine the circumstances of the improper contact and the extent of the prejudice, if any, to the defendant.... [A]n objective test should be applied in making an assessment of whether the defendant was prejudiced by the extraneous information. The court "should assess the 'possibility of prejudice' by reviewing the entire record, analyzing the substance of the extrinsic evidence, and comparing it to that information of which the jurors were properly aware."

Hornung, 848 F.2d at 1045 (citations omitted). The trial judge is "uniquely able to assess the likelihood that the extraneous information [considered by the jury] was prejudicial." *Mayhue*, 969 F.2d at 922.

****5** [6] In *Mayhue*, the jury foreman in a race discrimination case copied the dictionary definitions of the words "discriminate" and "prejudice" on to a piece of paper and read the definitions aloud to the other jurors during their deliberations. *Id.* at 921. The district court granted a new trial for the defendant based upon the jury's misconduct, and the plaintiff appealed. *Id.* at 921-22. On appeal, we cited a number of factors relevant to determining whether the presumption of prejudice has been rebutted when a jury consults a dictionary without authorization. *Id.* at 924. They are as follows:

(1) The importance of the word or phrase being defined

to the resolution of the case.

(2) The extent to which the dictionary definition differs from the jury instructions or from the proper legal definition.

(3) The extent to which the jury discussed and emphasized the definition.

(4) The strength of the evidence and whether the jury had difficulty reaching a verdict prior to introduction of the dictionary definition.

(5) Any other factors that relate to a determination of prejudice.

Id. at 924. Applying these factors to the circumstances in *Mayhue*, we determined the trial court did not abuse its discretion in granting the defendant a new trial. *Id.* at 926.

In the instant case, the district court provided counsel for Mr. Aguirre with the opportunity to present evidence and oral argument on the issue of whether the court should grant Mr. Aguirre a new trial due to juror misconduct. After careful consideration of the parties post-trial briefs and oral arguments, the court found:

The word distribute is a word that's commonly used, has a meaning that I think all of us understand. No showing that Ms. Howard or anybody else relied on what she saw, if anything, in whatever book she looked it up that made any difference at all in the jury deliberations.

> And I don't really care whether they looked up pontificate or not because that doesn't have anything to do with anything except it was a nice word and it was used, you know, in the course of the trial for a little humorous relief.
>
> But I do not believe that the violation of my instructions to the jury not to seek out any evidence outside the courtroom and looking up the word distribute or distribution, since it's a word of common use, common knowledge, I find that it had no prejudicial effect on the jury whatsoever.

Accordingly, the district court denied Mr. Aguirre's motion for a new trial.

We now turn to the factors delineated in *Mayhue* to determine whether the district court properly concluded the presumption of prejudice was rebutted.

1. Importance of the words.

First, we note the word pontificate was unimportant to the resolution of the case. As the district court found, "pontificate" was used during the trial "for a little humorous relief." The record does not show, nor does Mr. Aguirre even allege, that the term had any relevance to the jury's deliberations or to the offenses Mr. Aguirre was charged with committing. Thus, assuming the definition of the word "pontificate" was even researched, Mr. Aguirre was not prejudiced by such conduct.

**6 The jury's exposure to the dictionary definition of

the word "distribution" requires a closer inquiry. Unlike "pontificate," the term "distribution" was important to the jury's deliberations. "Distribution" appears repeatedly throughout the superseding indictment and the term is referred to in two of the counts Mr. Aguirre was charged with violating.

2. Extent to which dictionary and legal definitions differ.

Notwithstanding the term's importance, the district court properly noted the term "distribution" is a word of common usage and common knowledge. Webster's Ninth New Collegiate Dictionary includes the following definitions for distribute: to divide among several or many; to spread out so as to cover something; to give out or deliver, especially to members of a group. Webster's New Collegiate Dictionary 368 (1984). Webster's provides the following synonyms for distribute: dispense, divide, deal, and dole. *Id.* In its instructions to the jury, the district court defined the term "distribution," in the context of drug conspiracy, to mean "the defendant intentionally delivered marijuana to another person." We do not believe the dictionary definition of distribution differs appreciably or is less demanding than its legal definition provided by the district court. If anything, the dictionary definition is more detailed than the court's definition. Thus, to the extent any of the jurors determined Mr. Aguirre engaged in distribution under the term's dictionary meaning, they also determined Mr. Aguirre engaged in distribution under its legal definition.

3. Extent to which jury discussed and emphasized definition.

Mr. Owens testified that Ms. Howard read aloud the dictionary definition of distribution to the other jurors. However, the record does not indicate any of the jurors relied upon or attached any significance to the definition. Although Mr. Owens questioned nine of the twelve jurors after their verdict, he did not allege any of them relied upon this definition in reaching their verdict. Nor did he testify that any of the jurors other than Ms. Howard recalled that the definition of distribution was even read to them. Thus, this factor weighs in favor of a finding that Mr. Aguirre was not prejudiced by the juror misconduct.

4. Strength of evidence and whether jury had difficulty reaching verdict prior to introduction of definition.

The United States introduced a plethora of evidence at trial establishing Mr. Aguirre's involvement in large-scale drug distribution and money laundering. Between 1985 and 1992, the Internal Revenue Service estimated Eleno Aguirre and his wife spent $2,127,244.95 more than their reported income. In 1992, federal agents discovered $1,800,000.00 in cash buried in the backyard of Mr. Aguirre. Indeed, Mr. Aguirre does not even challenge the sufficiency of evidence against him on appeal. Furthermore, there is no evidence in the record that the jury was deadlocked or was having any difficulty reaching a verdict prior to the introduction of the definition.

5. Other factors relating to a determination of prejudice.

**7. Mr. Owens' affidavit indicates the term distribution was looked up and discussed as it related to the guilt or innocence of *Sonia Gallegos.* There is absolutely no

evidence the term was researched or discussed in connection with the determination of Mr. Aguirre's guilt. Accordingly, this factor also indicates the juror misconduct was not prejudicial to Mr. Aguirre.

Based on the above factors, we conclude the district court properly determined Mr. Aguirre was not prejudiced by the juror misconduct. The record clearly establishes any juror impropriety was harmless to Mr. Aguirre. Consequently, the district court did not err in denying the defendants' motion for a new trial based on juror misconduct.

C. Prosecutorial Vindictiveness

Finally, Mr. Aguirre contends the district court should have dismissed the superseding indictment because of prosecutorial vindictiveness. Following the mistrial, the United States filed a superseding indictment expanding the charges against Mr. Aguirre. Mr. Aguirre asserts the United States was aware of the information giving rise to the increased charges prior to his first trial. Given its prior knowledge, along with the fact the United States suffered negative publicity following the mistrial, Mr. Aguirre contends vindictiveness motivated the increased charges.

We decided a virtually identical vindictive prosecution claim in the recent appeal of Mr. Aguirre's co-defendant, Doloras Contreras. *See Contreras*, --- F.3d at ----. In *Contreras*, based on the totality of the circumstances, we determined there was no reasonable likelihood the increased charges in the superseding indictment stemmed from prosecutorial vindictiveness. Based on our reasoning in *Contreras*, Mr. Aguirre's vindictive prosecution claim also

fails.

IV. CONCLUSION

Based on the foregoing reasons, we hereby affirm the convictions of Mr. Aguirre in all respects.

FN* The Honorable Wiley Y. Daniel, United States District Judge for the District of Colorado, sitting by designation.

FN1. Pursuant to the court's order that "one motion made by one defense counsel applies to all [defendants]," all of the defendants, including Mr. Aguirre, adopted the motions of Mr. Rodriguez-Aguirre and Mr. Morales.

FN2. The United States attached affidavits from jurors Ronnie Warmuth and Kerry Romine to the United States' response to Ms. Gallegos' motion for a new trial. Mr. Warmuth stated:

> On further reflection, I do not believe that a dictionary was used at all. The only definition which was questioned regarded the word "pontificate" as used by the witness John Henry Lee. Mr. Kerry Romine, a fellow juror, knew the definition of this word and no dictionary was consulted.
>
> Similarly, Mr. Romine testified that although a question arose during deliberations as to the definition of the word "pontificate," "the jury ... did not at any time consult a dictionary."

FN3. In his opening brief, Mr. Aguirre also argued the district court erred in summarily rejecting Mr. Aguirre's objections to his presentence report without a hearing and without findings of fact. (*Id.*) However, Mr. Aguirre withdrew this argument in a subsequent motion to strike. (Apt's motion to supplement and strike part III, at 1-2.)

FN4. In *Contreras,* we also determined the district court did not violate Fed.R.Crim.P. 43 or 28 U.S.C. s 753(b) by failing to dismiss the 132 jurors in open court and in the presence of the defendants. *See id.* at ----. To the extent Mr. Aguirre asserts claims under Rule 43 or 28 U.S.C. s 753(b), these claims are rejected pursuant to our reasoning in *Contreras.*

Supreme Court, U.S.
FILED
SEP 17 1997
CLERK

No. 96-1982

In the Supreme Court of the United States

OCTOBER TERM, 1996

ELENO AGUIRRE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioner waived his claim that the district court's jury selection process violated the Jury Selection and Service Act of 1968, 28 U.S.C. 1861-1878.

2. Whether the district court's pre-*voir dire* dismissal of more than 100 potential jurors violated the Jury Selection and Service Act.

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In the Supreme Court of the United States

OCTOBER TERM, 1996

No. 96-1982

ELENO AGUIRRE, PETITIONER

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UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A16) is reported at 108 F.3d 1284.

JURISDICTION

The judgment of the court of appeals was entered on March 11, 1997. The petition for a writ of certiorari was filed on June 9, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of New Mexico, petitioner was

convicted of conspiring to distribute, and to possess with intent to distribute, marijuana and cocaine, in violation of 21 U.S.C. 846; money laundering, in violation of 18 U.S.C. 1956(a)(1)(B)(i); investing drug proceeds, in violation of 21 U.S.C. 854; and possessing cocaine with the intent to distribute it, in violation of 21 U.S.C. 841(a)(1). The district court sentenced petitioner to a term of 235 months' imprisonment, to be followed by a five-year period of supervised release. The court of appeals affirmed. Pet. App. A1-A16.

1. Petitioner's brother, Gabriel Aguirre, headed a drug trafficking organization that sold large quantities of marijuana and cocaine. Between 1984 and 1992, the organization sold more than 20,000 pounds of marijuana and more than 20,000 pounds of cocaine throughout the United States. The organization used drug proceeds to acquire real property and other assets. Petitioner participated in his brother's drug trafficking organization. Petitioner and twenty-one others were indicted for their drug trafficking activities. The original trial resulted in a mistrial. Pet. App. A2-A3.

2. Before the retrial of petitioner and his co-defendants, the district court randomly selected a panel of approximately 250 prospective jurors. After reviewing juror questionnaires, the district court directed 115 of those prospective jurors to report for jury service and excused the rest. Petitioner and his co-defendants received the juror questionnaires and learned about the court's actions six days before the start of trial. Pet. App. A3.

On the first day of trial, before jury selection, one of petitioner's co-defendants filed a motion alleging that the jury venire underrepresented the Hispanic and American Indian population of the District of

New Mexico; all defendants joined in the motion. Defendants also sought to stay the trial so that they could conduct an investigation aimed at proving that claim. Counsel for one of petitioner's co-defendants also stated orally that one prospective juror apparently was excused because she knew one of the defendants. Counsel argued that such an exclusion constituted reversible error under *United States* v. *Calabrese*, 942 F.2d 218 (3d Cir. 1991). Pet. App. A3-A4.

The district court conducted an evidentiary hearing. Nancy Metzger, a jury administrator for the United States District Court for the District of New Mexico, testified that the jury panel of 250 jurors had been selected at random from voter registration lists in the Roswell Division of the District of New Mexico. She further testified that the district judge reviewed the juror questionnaires and directed her to excuse more than 100 of those jurors. Metzger testified that she did not know the ethnicity of either the excused jurors or the jurors who had reported for service. Pet. App. A4.

The district court stated that it had reviewed the juror questionnaires it had received from the clerk's office and had retained the questionnaires of the jurors "who, for some reason or other, claimed that they couldn't serve." Pet. App. A4. The court further stated:

> I think it goes without saying that the ones that were not summoned, I never looked at the last name, whether it was [a] Hispanic surname or whether it was not a Hispanic surname, or whether they were American Indians or not. As a

> matter of fact, I'm not real sure that that's part of the questionnaire.

Id. at A5. Metzger confirmed that the questionnaire did not require the jurors to specify their ethnicity. *Ibid.*

The district court denied defense motions to stay the proceedings and to quash the jury venire. The district court invited the defendants to supplement the record with information concerning the racial composition of the jury pool in the District of New Mexico and the Roswell Division, but defendants chose not to do so. Following a trial, petitioner was convicted on all four counts on which he was charged. Pet. App. A5.

3. The court of appeals affirmed. Pet. App. A1-A16. The court rejected petitioner's contention that the district court's dismissal of more than 100 prospective jurors violated the Jury Selection and Service Act. The court noted that 28 U.S.C. 1867(d) requires all motions challenging compliance with that Act to be accompanied by a "sworn statement of facts which, if true, would constitute a substantial failure to comply with the [Act]." Pet. App. A7. Because petitioner "failed to file a sworn affidavit in support of his motions challenging the district court's jury selection procedures," the court concluded that petitioner's "Jury Selection and Service Act claim is barred." *Ibid.* The court noted that it had reached the same conclusion in *United States* v. *Contreras*, 108 F.3d 1265, 1266-1268 (10th Cir. 1997), petition for cert. pending, No. 96-9286, an appeal by one of petitioner's co-defendants.

Relying on *Contreras*, the court of appeals also rejected petitioner's Fifth Amendment and Sixth

Amendment challenges to the jury selection procedures. Pet. App. A8. The court noted that it had determined in *Contreras* that "Ms. Contreras could not establish a *prima facie* case of a fair cross section violation or an equal protection violation," and that "Ms. Contreras' Sixth Amendment impartial jury claim was without merit." *Ibid.* For the same reasons, the court found "no merit in [petitioner's] constitutional challenges to the jury selection procedures." *Ibid.*

ARGUMENT

1. Petitioner contends (Pet. 21-25) that the court of appeals erred in holding that he waived his claim under the Jury Selection and Service Act. That contention is without merit and does not warrant review.

a. The Jury Selection and Service Act of 1968 governs the selection of grand and petit juries in federal court. The Act requires each federal district court to devise a written plan for the random selection of jurors. 28 U.S.C. 1863(a). Under the Act, jurors may be removed from service only (1) upon a showing of undue hardship or extreme inconvenience, (2) on the ground that such person may be unable to render impartial jury service or that his service as a juror would be likely to disrupt the proceedings, (3) upon peremptory challenge, (4) for good cause shown, or (5) upon determination that his service as a juror would be likely to threaten the secrecy of the proceedings, or otherwise adversely affect the integrity of jury deliberations. 28 U.S.C. 1866(c).

A party challenging the jury selection process under the Act must make that challenge "before the voir dire examination begins, or within seven days after the defendant discovered or could have dis-

covered, by the exercise of diligence, the grounds therefor, whichever is earlier." 28 U.S.C. 1867(a). The defendant's motion to dismiss the indictment must contain a "sworn statement of facts which, if true, would constitute a substantial failure to comply with the [Act]." 28 U.S.C. 1867(d). If the court determines that there has been a substantial failure to comply with the Act, "the court shall stay the proceedings pending the selection of a petit jury in conformity with [the Act]." *Ibid.* The procedures prescribed in 28 U.S.C. 1867 "shall be the exclusive means by which a person * * * may challenge any jury on the ground that such jury was not selected in conformity with the provisions of [the Act]." 28 U.S.C. 1867(e).

b. In this case, petitioner concedes (see Pet. 21) that he did not file the sworn statement required by 28 U.S.C. 1867(d) as a prerequisite to a challenge under the Act. He nonetheless contends (Pet. 22) that his procedural default should be excused because the evidentiary hearing in this case fulfilled the purpose of the sworn statement requirement. Section 1867(d), however, unequivocally requires a motion challenging jury selection procedures to contain "a sworn statement of facts which, if true, would constitute a substantial failure to comply with the [Act]." The Act does not create any exceptions from that requirement. To the contrary, it provides that the procedures prescribed under Section 1867 "shall be the exclusive means" by which a person may challenge jury selection procedures. 28 U.S.C. 1867(e). The court of appeals therefore correctly concluded that petitioner's claim was barred by the text of the Act.

The court of appeals' holding that the Act requires strict compliance with the sworn statement require-

ment is consistent with decisions from other circuits. For example, in *United States* v. *Kennedy*, 548 F.2d 608, 612-614, cert. denied, 434 U.S. 865 (1977), the Fifth Circuit held that the defendant forfeited his claim under the Jury Selection and Service Act by failing to comply with the sworn statement requirement, even though the undisputed facts known to the district court established a substantial violation of the Act. The court reasoned that "Congress left no room for ad hoc review of the usefulness of compliance with [the sworn statement] requirement." *Id.* at 613. The court further explained that:

> [i]n the Act, Congress set out a uniform, relatively strict scheme for jury selection. Congress included a new remedy for substantial violations of the Act, regardless of whether the litigant challenging the jury had been prejudiced by the jury selection. As a price for this remedy, Congress was entitled to exact strict compliance with formal procedural rules.

Ibid.

Other courts of appeals have likewise strictly enforced the sworn statement requirement. See *United States* v. *Maldonado*, 849 F.2d 522, 523 (11th Cir. 1988) (per curiam) (defendant failed to preserve objection to jury selection because no sworn statement was submitted with motion); *United States* v. *LaChance*, 788 F.2d 856, 876 (2d Cir.) (untimely motion that did not contain sworn statement of facts properly denied), cert. denied, 479 U.S. 883 (1986); *United States* v. *Wellington*, 754 F.2d 1457, 1468 (9th Cir.) (defendant's failure to file sworn statement precluded relief), cert. denied, 474 U.S. 1032 (1985); *United States* v. *Foxworth*, 599 F.2d 1, 3 (1st Cir. 1979) (report filed with

motion was not sworn and therefore precluded challenge to jury selection process); see also *United States* v. *Paradies*, 98 F.3d 1266, 1277-1278 (11th Cir. 1996) (although defendants filed sworn statement with timely motion objecting to district court's *sua sponte* excusal of more than 70 potential jurors before *voir dire*, challenge to jury selection process was barred because statement did not assert facts that, if true, would have constituted violation of Act), cert. denied, 117 S. Ct. 2483 (1997), and petition for cert. pending, No. 96-1346; *United States* v. *Percival*, 756 F.2d 600, 614-615 (7th Cir. 1985) (challenge to jury selection properly denied where sworn statement did not show substantial violation of Act).

c. Petitioner contends (Pet. 24) that the decision below conflicts with the Third Circuit's decision in *United States* v. *Calabrese*, 942 F.2d 218, 222 (1991). In *Calabrese*, a defendant elicited the testimony of a court clerk that a significant number of jurors had been excluded based solely on the ground that they knew one of the defendants. The court of appeals held that the defendant had adequately preserved his claim that the exclusions violated the Jury Selection and Service Act, even though he had not filed the sworn statement required by Section 1867(d). The court reasoned that the clerk's testimony contained "undisputed facts" (*id.* at 222) that established a substantial violation of the Act (*id.* at 227-229). In particular, the court concluded that the clerk's testimony established that the district court had effectively created "a new category of exclusions" beyond those set forth in Section 1866(c). *Id.* at 228.

As the Tenth Circuit stated in *Contreras*, the exception to the sworn statement requirement created in *Calabrese* is "contrary to the overwhelming

weight of authority." 108 F.3d at 1267. Even if such an exception were recognized, however, petitioner could not benefit from it. The evidence at the hearing in this case established only that the clerk randomly selected a panel, and that the district judge excused certain jurors based on their questionnaires. Pet. App. A4-A5. Those limited facts do not establish a substantial violation of the Act. As noted above, the Jury Selection and Service Act expressly authorizes a district court to excuse jurors for certain reasons, 28 U.S.C. 1866(c), and no evidence elicited at the hearing established that the district court in this case excused jurors for reasons other than those set forth in the Act. Indeed, in pressing his claim of a Jury Selection and Service Act violation, petitioner ultimately relies (Pet. 15-16, 19-20) on his assessment of whether the jury questionnaires furnished a permissible basis for exclusion, not solely on evidence adduced at the hearing. The decision in *Calabrese* therefore does not provide a basis for granting review in this case.

2. Petitioner contends (Pet. 17-21) that the district court's pre-*voir dire* dismissal of more than 100 jurors violated the Jury Selection and Service Act. Because the court of appeals held that petitioner waived his claim under the Act, however, it did not address that contention. That issue is therefore not properly presented here.

In any event, petitioner errs in contending that the district court's dismissal of jurors constituted a substantial failure to comply with the Act. In determining whether there has been a "substantial" violation, courts of appeals have examined both the number of errors, and whether there has been a frustration of the Act's basic principle of exclusion on the basis of

objective criteria only. *Calabrese*, 942 F.2d at 227-228; *United States* v. *Bearden*, 659 F.2d 590, 607 (5th Cir. 1981). Thus, a substantial violation generally cannot be found if the number of errors is small. *Ibid.* And while the application of nonstatutory, subjective criteria can constitute a substantial failure to comply with the Act, the mere misapplication of the objective criteria set forth in the Act cannot. *Calabrese*, 942 F.2d at 228; *Bearden*, 659 F.2d at 608.

Judged by those standards, there was not a substantial violation of the Act in this case. After a "thorough review of the excused-juror questionnaires" in this case, the court of appeals in *Contreras* concluded that "all but perhaps two of the dismissed jurors were eligible under the Jury Selection and Service Act for dismissal based on undue hardship or bias." 108 F.3d at 1269. As to those jurors eligible for dismissal, the district court did not abuse its discretion in excusing them. *Ibid.* Of the remaining two jurors, one was dismissed because she may have known one of the defendants, and the other was dismissed after stating on her questionnaire that she was unable to serve for confidential reasons. *Id.* at 1269-1270. If the district court erred in dismissing those two jurors, the errors affected an insignificant number of jurors. The errors stemmed from a misapplication of the objective criteria of bias and hardship, and not from the application of nonstatutory, subjective criteria. Such errors do not constitute a "substantial" failure to comply with the Act. In any event, that fact-bound issue does not warrant review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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SEPTEMBER 1997